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No. 88-1771

In The

Supreme Court of the United States

October Term, 1988

JOSEPH A. BONJORNO, LORRAINE KERR, (EXECUTRIX OF THE WILL OF GEORGE M. KERR, JR.), AND BARBARA K. CLISBY,

Cross-Petitioners

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,

Cross-Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CROSS-PETITIONERS' REPLY BRIEF

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CROSS-PETITIONERS' POINTS IN REPLY

Cross-Respondents' Brief in Opposition to Cross-Petitioners' Conditional Cross-Petition is an astounding attempt to deny reality:

1. *Kaiser ignores the 15-year history of this litigation* set forth at length in the Bonjorno Time Line in the Appendix to the Cross-Petition. Plaintiffs suffered injury at Kaiser's hands beginning over 15 years ago. Plaintiffs' damages were measured as of May 30, 1977, over 12 years ago. Plaintiffs secured a money judgment in federal District Court on August 22, 1979, over nine years ago. Kaiser has reaped a benefit of more than $17 million by delaying any payment on its liability from August 1979 until July 1986, and by refusing to pay Plaintiffs any interest whatsoever.

2. *Kaiser ignores Federal Rule of Appellate Procedure 37* which governs the award of interest on judgments of the Court of Appeals and grants the Court discretion to award adequate interest to preserve the value of the judgment against diminution due to loss of the time value of money. Astoundingly, Kaiser's Brief does not even discuss, let alone *cite* Federal Rule of Appellate Procedure 37 although that rule is at the heart of Cross-Petitioners' arguments. Kaiser also entirely ignores the holding of the Tenth Circuit in *Northern Natural Gas Co. v. Hegler,* 818 F.2d 730, 738 (10th Cir. 1987) that even district courts have "discretion to keep the rates in accordance with the real world."

3. *Kaiser ignores all principles of equity* in contending in its Brief that Courts do not have authority "to vary the postjudgment interest rate in order *adequately to preserve the value of the judgment,*" (Cross-Respondents' Brief at 6

(emphasis added)). At the same time, it contends in its own Petition for Certiorari that "manifest injustice" warrants application of a law repealed by Congress seven years ago, in a manner that would even further dilute the value of the judgment.

Kaiser also disingenuously contends that the goal of "uniformity" supports its position, while arguing for reinstatement of the very lack of uniformity Congress sought to avoid by repealing the law providing for interest on federal judgments at various state law rates.

4. *Kaiser attempts to ignore the different bases of authority for awards of interest in federal courts* by suggesting that interest under one provision or another is either higher or lower than the interest provided under 28 U.S.C. § 1961. Cross-Respondents' Brief at 4. Kaiser thus acknowledges that there are a number of different bases for interest awards in federal courts, but fails to meet Plaintiffs' argument that Federal Rule of Appellate Procedure 37 provides *discretion* to the Court of Appeals in setting the rate of interest adequately to protect the value of the judgment against diminuation due to loss of the time value of money.

Both of the cases upon which Kaiser principally relies support Plaintiffs' position. In *West Wisconsin Railway v. Foley*, 94 U.S. 100 (1877), this Court reaffirmed its prior holdings, cited in Plaintiffs' Cross-Petition at 17, that *this Court's* Rules governed interest on this Court's judgments, not the predecessor to 28 U.S.C. § 1961 which only governed interest on *district court* judgments. Similarly, in the present case Fed. R. App. P. 37 governs interest on the Court of Appeals' judgment, not 28 U.S.C. § 1961, which

is expressly limited by its terms to district court judgments.

Moreover, this Court in *Foley* held that 10% provided the upper limit for interest under this Court's Rule in effect at the time, but the award should be adjusted to accurately "compensate to some extent for the loss which results from delay." 94 U.S. at 103. In the present case, Fed. R. App. P. 37 *does not provide an upper limit* and therefore an award at market rates is appropriate as the measure of the diminution of the value of the judgment.

Moreover, *Pierce v. United States*, 255 U.S. 398 (1921), cited in Kaiser's Brief at 3, also supports Plaintiffs. In *Pierce*, as in the cases cited in Plaintiffs' Cross-Petition at 17, this Court noted the limited scope of the predecessor to 28 U.S.C. § 1961. That statute applies by its terms to civil judgments at law in district court, but there are clearly other independent bases for interest awards in the federal courts, including Fed. R. App. P. 37, which is at issue in the present case.

5. *Kaiser ignores the effect of jury verdicts and mischaracterizes the record in suggesting that it "prevailed on its post-trial motions."* In reality, all of Kaiser's post-trial motions as to liability were denied. Kaiser's post-trial motions seeking to retry or overrule the jury's findings on damages were ultimately *unsuccessful*, as the retrial limited to damages resulted in an *increase* in the damages awarded by the second jury, and the Court of Appeals ultimately reinstated that jury's verdict as to damages, notwithstanding Kaiser's securing an incorrect ruling from the District Court attempting to reduce those damages.

6. *Kaiser ignores the fact that a money judgment was entered against it in District Court on August 22, 1979,* and although damages were subsequently recalculated, the liability finding and judgment were never disturbed. Thus, contrary to Kaiser's misleading discussion of post-judgment interest cases (Cross-Respondents' Brief at 9-11), interest from the original judgment is even more compelling in the present case than in the Ninth Circuit cases such as *Handguards, Inc. v. Ethicon,* 743 F.2d 1282 (9th Cir. 1984), *cert. denied,* 469 U.S. 1190 (1985), in which the first judgment was reversed on grounds of, *inter alia,* "insufficient evidence to support a jury charge on one of plaintiff's two theories of liability" and in which "[a]fter a new trial, a jury awarded damages in an amount larger than the first judgment." *Handguards, Inc. v. Ethicon, Inc.,* 552 F. Supp. 820, 822 (N.D. Cal. 1982), *aff'd,* 743 F.2d 1282 (9th Cir. 1984), *cert. denied,* 469 U.S. 1190 (1985). Kaiser has stated no basis whatsoever for distinguishing the present case from the other cases cited by Cross-Petitioners which all support interest dated back to the original judgment in favor of the party seeking interest, not the date upon which damages were recalculated. *See* Cross-Petition at 22-29.

7. *Kaiser ignores Plaintiffs' argument below for market rates.* Contrary to Kaiser's suggestion that Cross-Petitioners failed to contend below that Federal Rule of Appellate Procedure 37 governs the rate of interest in the present case, Plaintiffs' brief below contained express arguments that:

> "TO VINDICATE AND IMPLEMENT THE BASIC POLICIES DISCUSSED ABOVE, THE COURT, PURSUANT TO ITS EQUITABLE POWERS UNDER FED. R. APP. P. 37, SHOULD AWARD INTEREST AT FULL MARKET RATES"

That section of Plaintiffs' appellate brief is reproduced in an appendix to this brief at A-1 to A-7.

8. *Kaiser ignores Plaintiffs' Conditional Petition for Rehearing.* Contrary to Kaiser's suggestion that Cross-Petitioners did not petition for rehearing before the Court of Appeals, Plaintiffs filed a Conditional Petition for Rehearing, similar to the Conditional Cross-Petition they have filed before this Court. The section on the Summary of Plaintiff's Position set forth in their Conditional Petition for Rehearing filed in the Third Circuit is reproduced in the Appendix to this Brief at A-8 to A-10.

9. *This Court should deny certiorari on Kaiser's Petition in No. 88-1595.* Kaiser attempts to misstate Cross-Petitioners' position by suggesting that it agrees with a position Cross-Petitioners have never taken. Contrary to Kaiser's statement on page 8 of its Brief, Cross-Petitioners' vigorously oppose the grant of certiorari. Cross-Petitioners have asserted only a *Conditional* Cross-Petition, requesting the Court to grant certiorari on the issues raised by Cross-Petitioners *only* if the Court grants Kaiser's Petition for Certiorari.

Kaiser's Brief in Opposition to Plaintiffs' Conditional Cross-Petition, like the rest of Kaiser's pleadings and briefs in this 15-year litigation, simply fails to meet the substance and justice of Plaintiffs' contentions and attempts to deny the effects of the wrong perpetrated by Kaiser upon Plaintiffs. Kaiser has taken away not only Plaintiffs' business, but 15 years of their lives in pursuing justice in the Courts. Kaiser argues for inequitable results allowing it to keep the $17 million windfall it has obtained by delaying payment on Plaintiffs' judgment,

and fails to establish any basis for such an inequitable result by failing even to address the basic legal arguments raised by Plaintiffs.

CONCLUSION

For all the reasons stated above, as well as the reasons stated in Plaintiffs' Conditional Cross-Petition for Certiorari and Plaintiffs' Brief in Opposition to Kaiser's Petition for Writ of Certiorari, Plaintiffs respectfully request that Kaiser's Petition be denied. If Kaiser's Petition is granted, respectfully, the Court should also grant the Plaintiffs' Cross-Petition to consider all of the interrelated interest issues decided by the Third Circuit.

Respectfully submitted,

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IN THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

JOSEPH A. BONJORNO, GEORGE M. KERR, JR., and BARBARA K. CLISBY, Appellants–Plaintiffs–Cross-Appellees	)	
vs.	)	NOS. 88-1318 and 88-1396
KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC., Appellees–Defendants–Cross-Appellants	)	

APPEAL FROM ORDER OF
THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF PENNSYLVANIA
(C.A. 74-122)

BRIEF OF APPELLANTS–PLAINTIFFS–CROSS-APPELLEES JOSEPH A. BONJORNO, GEORGE M. KERR, JR. AND BARBARA K. CLISBY IN SUPPORT OF THEIR CLAIM FOR INTEREST ON THE JUDGMENT

* * *

B. TO VINDICATE AND IMPLEMENT THE BASIC POLICIES DISCUSSED ABOVE, THE COURT, PURSUANT TO ITS EQUITABLE POWERS UNDER FED. R. APP. P. 37, SHOULD AWARD INTEREST AT FULL MARKET RATES

In assessing the appropriate amount of interest, it is important to stress again that if Kaiser were to prevail in its argument that it owes only $1,223 interest, it would have been able to pay off the entire damage judgment of $9.6 million out of its $17 million gain from the use of Plaintiffs' money and retain a profit from delay of $7.4 million. As discussed below, this Court possesses inherent equitable powers, as reflected in Fed. R. App. P. 37, to award full market rates – and is not limited to the T-Bill rates set by amended 28 U.S.C. § 1961.

1. This Court Has Inherent Equitable Powers Under Fed. R. App. P. 37 To Award Interest At Full Market Rates

Numerous cases, commentary and decisions in this circuit, establish this Court's inherent equitable and restitutionary powers under Federal Rule of Appellate Procedure 37 to award interest.[43] In *Brock v. Richardson*, 812

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[43] *See generally Briggs v. Pennsylvania R. Co.*, 334 U.S. 304 (1948) (discussing power of appellate court over appropriate interest award); *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 561-64 (3d Cir. 1985) (in banc) (discussing inherent power of court); *Brock v. Richardson*, 812 F.2d 121 (3d Cir. 1987) (equitable power to award postjudgment interest).

The Judiciary Act of 1789 empowered the Supreme Court and circuit courts to award "just damages for . . . delay" upon affirmance of a judgment or decree. Judiciary Act of

(Continued on following page)

F.2d 121 (3d Cir. 1987) this Court held that an equitable award of interest was appropriate to preserve the value of an equitable remedy, regardless whether 28 U.S.C. § 1961 mandated interest on the award.[44]

Moreover, when the Court exercises its equitable power to award interest, it should be awarded at market rates to carry out the purpose of interest to preserve the

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(Continued from previous page)

1789, ch. 20, Sec. 23, 1 Stat. 73, 85. This Statute, which is currently codified at 28 U.S.C. § 1912, is the basis for Supreme Court rules, which have been in effect since 1803 allowing interest on judgments while pending on a writ of error before the Supreme Court. *Perkins v. Fourniquet*, 55 U.S. (14 How.) 328, 330-34 (1852); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 147-49 (1851); *Boyce's Executioners v. Grundy*, 34 U.S. (9 Pet.) 275, 289 (1835). *See* U.S. Supreme Court Rule 49.

Similarly, 28 U.S.C. § 1912 presumably forms the basis for at least the first sentence of Fed. R. App. P. 37, which mandates interest on affirmance of a judgment. The power for interest pursuant to the second sentence of Fed. R. App. P. 37 presumably stems from a combination of: (1) 28 U.S.C. § 1912; (2) 28 U.S.C. § 1961; (3) the *inherent power* of the Court; and (4) the Rules Enabling Act, 28 U.S.C. §§ 2701-2704.

[44] Exercise of this power is consistent with the authority of the courts to use the "equity of the statute" in interpeting 28 U.S.C. § 1961. On the equity of the interest statute, see *National Bank v. Mechanics National Bank*, 94 U.S. 437, 439 (1877) *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270 (3d Cir. 1987); *Turner v. Japan Lines, Ltd.*, 702 F.2d 752, 755-57 (9th Cir. 1983).

value of the award.[45] Market rates are appropriately granted pursuant to the Court's equitable power to award postjudgment interest, as well as its equitable power to award prejudgment interest.[46]

2. Under The Special Circumstances Of This Case, Market Rates Should Be Awarded

Although there is no bright line precedent requiring awarding of full market rates, rather than the fixed T-Bill rate provided for under 28 U.S.C. § 1961, as amended, the case for market rates in this case of first impression is compelling and we urge its adoption as the just and equitable result.[47]

Kaiser has been unjustly enriched by the delay inherent in litigation. Kaiser should now pay, out of the

---

45 For cases awarding prejudgment interest at market rates as a matter of restitution, see *Peterson v. Crown Financial Corp.*, 661 F.2d 287 (3d Cir. 1981); *Lexington Insurance Co. v. Abington Co.*, 621 F. Supp. 18 (E.D. Pa. 1985); *Sack v. Feinman*, 489 Pa. 152, 413 A.2d 1059 (1980); *Murray Hill Estates, Inc. v. Bastin*, 442 Pa. 405, 276 A.2d 542, 545 (1971); *Rizzo v. Haines*, 357 Pa. Super. 57, 515 A.2d 321 (Pa. Super. 1986).

46 *Brock v. Richardson*, 812 F.2d 121, 126, 127 (3d Cir. 1987); *Northern Natural Gas Co. v. Hegler*, 818 F.2d 730, 738 (10th Cir. 1987). *But see Ball v. Rolling Hill Hospital*, 359 Pa. Super. 286, 302, 518 A.2d 595 (1984); *Daset Mining Corp. v. Industrial Fuels Corp.*, 326 Pa. Super. 14, 473 A.2d 584 (1984).

47 The law always allows for change to fit the justice of the case lest rules "simply persis[t] from blind imitation of the past." Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 459 (1897).

benefits it has received by holding Plaintiffs' money,[48] sufficient interest to preserve at market rates the damage award back to the liability verdict date.

For full relief, Plaintiffs should receive an award of interest on the following basis:

> *Time Period:* From the date liability was determined (August 16, 1979)[49] until final payment of all interest and principal.
>
> *Rate:* Full market rates: monthly average prime rates, compounded monthly.[50]
>
> *Principal Amount:* The $9,567,939 damage judgment as found by the jury based on the liability verdict of August 16, 1979.

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48 The purpose of restitution is to "deprive the defendant of benefits that in equity and good conscience he ought not to keep . . . ." D. Dobbs, *Handbook of the Law of Remedies* § 4.1, at 224 (1973).

49 As discussed below in section VI., D., 3., postjudgment interest should be awarded from August 16, 1979. Moreover, full compensation for delay would require additional interest on single damages from May 31, 1977. Plaintiffs' damages were valued as of May 31, 1977, yet Plaintiffs did not receive one cent from Kaiser until nine years later, on July 3, 1986. No compensation for delay has been received by Plaintiffs.

50 These rates are substantially less than the actual cost of money to Plaintiffs (2.5% above Philadelphia National Bank's ("PNB") daily prime rate or 3% above PNB's average monthly commercial paper rate, whichever rate was greater, compounded monthly), that they were required to pay on a $193,760.28 loan, which obligation had more than tripled to $638,627.58 through accumulation of interest through September 1986, when it was paid. *See* Affidavit of Joseph A. Bonjorno (R. 491a).

Assuming full payment was made on June 13, 1988, (i.e., the date this brief was originally due) the total award would amount to $17,080,036.78.[51]

In light of the unprecedented increase in commercial interest rates during the life of this case,[52] it is appropriate to award postjudgment interest at rates "in accordance with the real world." *Northern Natural Gas Co. v. Hegler*, 818 F.2d 730, 738 (10th Cir. 1987). An award of interest at market rates is consistent with this Court's equitable power to award interest to preserve the value of the judgment. *See Brock v. Richardson*, 812 F.2d at 127; *cf. Peterson v. Crown Financial Corp.*, 661 F.2d 287 (3d Cir. 1981) (prejudgment interest).

Moreover, an award of postjudgment interest at market rates in the present case is consistent with the law of this Circuit which generally recognizes that provisions for interest in litigation should reflect the full rate of interest in the private market.[53]

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51 *See* Affidavit of Charles J. O'Donnell, ¶5, *Addendum* at tab 4.

52 See chart of interest rates in Reitz, *Interest on Judgments* at 4. (R. 455a-1).

53 *See Phoenix Canada Oil Co., Ltd. v. Texaco, Inc.* 842 F.2d 1466, 1479-80 (3d Cir. 1988) (prejudgment interest held to fluctuate with Ecuadorian legal rate up to 23%); *Green v. USX, Corp.*, 843 F.2d 1511, 1530 & n.16 (3d Cir. 1988) (favoring presumption of award of prejudgment interest, except where award would result in "unusual inequities"); *Institutionalized Juveniles*, 758 F.2d at 922-24 (time delay adjustments to attorney fee awards should accurately reflect the time value of money); *Devex Corp. v. General Motors Corp.*,

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Thus, authority and compelling public policy reasons permit this Court, under its Rule 37 equitable powers, to award full market rates.

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749 F.2d 1020, 1023-24 (3d Cir. 1984), *cert. denied*, 475 U.S. 819 (1985) (liberal interpretation of former § 1961 to allow plaintiffs the benefit of higher interest rate currently in effect under state law in Delaware).

IN THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

JOSEPH A. BONJORNO, GEORGE M. KERR, JR., and BARBARA K. CLISBY, Appellants–Plaintiffs–Cross-Appellees	)	
vs.	)	NO. 88-1318 and 88-1396
KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SLAES, INC., Appellees–Defendants–Cross-Appellants	)	Before: Stapleton, Scirica and Cowen, Circuit Judges

CONDITIONAL PETITION FOR REHEARING TO PRESERVE ISSUES DECIDED ADVERSELY TO PLAINTIFFS

Appellants/Plaintiffs/Cross-Appellees Joseph A. Bonjorno, George M. Kerr, Jr. and Barbara K. Clisby ("Plaintiffs"), by their attorneys, submit this Conditional Petition for Rehearing to preserve (in the event that rehearing before the panel or before the active members of this Court *in banc* is granted on any petition that Defendant Kaiser may file) those issues presented, briefed, and argued to the panel, which the panel decided against the Plaintiffs:

Summary of Plaintiffs' Position

1. For reasons fully explained below, Plaintiffs/Appellants have determined that after fifteen years of litigation, enough is enough. Even though they lost on several major issues (which result in a very significant reduction in the amount of interest to which they and their counsel believe they are entitled in law and equity) they are gratified that the panel awarded them the federal T-bill annually compounded interest rather than the six percent simple interest allowed under Pennsylvania law as awarded by the Court below. Thus in the interest of terminating this case after fifteen years of expensive and exhausting litigation and getting on with their lives and businesses, they have determined not to prolong these proceedings any longer by seeking, in their own right, rehearing before the panel or this Court *in banc* on the issues they lost.

2. Plaintiffs through their counsel have so advised Kaiser through its counsel of their decision and have urged Kaiser to do the same.

3. Therefore, only in the event that the panel or the Court *in banc* were to decide to grant any request for rehearing by Kaiser, Plaintiffs wish to preserve for any rehearing that might be granted the two issues on which they lost:

a. Plaintiffs' contention that interest should run from the date of the original damage judgment on August 22, 1979;

b. Plaintiffs' contention that if interest runs from the date of the original damage judgment, this Court has the power under Federal Rule of Appellate Procedure 37 and its inherent equitable power and should award interest at full market rates, which would result in a total amount of interest in excess of $17 million.